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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ADAM LANCE SILVER,

Defendant and Appellant.

B240273

(Los Angeles County
Super. Ct. No. MA051038)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Bernie C. LaForteza, Judge. Affirmed as modified.

Catherine White, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and
Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to a negotiated agreement, Adam Lance Silver pleaded no contest to two counts of committing a lewd act upon a child under the age of 14 years and was sentenced to an aggregate state prison term of 10 years. On appeal Silver contends the minute order entered following his sentencing hearing and the abstract of judgment should be corrected to conform to the trial court's oral pronouncement of judgment, which did not include any penalty assessments on the sex offender fine. He also contends the trial court miscalculated his presentence custody credit. We affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

Silver was charged in an information with two counts of committing a lewd act upon a child under the age of 14 years between August and October 2010 (Pen. Code, § 288, subd. (a))¹ with a special allegation he had suffered two prior serious or violent felony conviction within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)). Silver pleaded not guilty and denied the special allegation.

Represented by appointed counsel, Silver agreed to plead no contest to both charges and to admit one of the two prior strike allegations. In accordance with the terms of the negotiated agreement, on January 31, 2012 Silver was sentenced to an aggregate state prison term of 10 years: six years (the lower term of three years doubled under the Three Strikes law) on one count and a consecutive term of four years (one-third the middle term of six years doubled under the Three Strikes law) on the second count. The court ordered Silver to pay a \$40 court operations assessment and a \$30 criminal conviction assessment on each count, a \$300 sex offender fine and a \$600 restitution fine. The court imposed and suspended a parole revocation fine pursuant to section 1202.45. The court dismissed the remaining special allegation on the People's motion. Silver was awarded a total of 507 days of presentence custody credit (441 actual days and 66 days of conduct credit).

¹ Statutory references are to the Penal Code.

DISCUSSION

1. *The Trial Court Erred in Failing To Impose Certain Mandatory Penalty Assessments*

When sentencing Silver, the trial court ordered him to pay a \$300 sex offender fine pursuant to section 290.3, subdivision (a).² The court did not mention any related penalty assessments in its oral pronouncement of judgment. Nonetheless, the minute order entered following the sentencing hearing, as well as the abstract of judgment, reflect the court's imposition of \$840 in penalty assessments on that fine. Although he does not dispute the calculation of the penalty assessments or claim an inability to pay the fine, Silver argues the \$840 in penalty assessments should be stricken to conform to the oral pronouncement of judgment.

Generally, when there is a discrepancy between the oral pronouncement of judgment and the minute order of the judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186; see *People v. Zackery* (2007) 147 Cal.App.4th 380, 385 [“[w]here there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls”].) However, once the trial court has determined a defendant is required to pay the fine prescribed by section 290.3, subdivision (a), it is jurisdictional error not to impose the mandatory penalties and surcharges established by section 1464, subdivision (a), and Government Code section 76000, subdivision (a), and related provisions. (*People v. Stewart* (2004) 117 Cal.App.4th 907, 910; see *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157.)

Having concluded Silver was able to pay the sex offender fine, the trial court was required to impose the penalties mandated by these statutory provisions. Accordingly, we modify the oral pronouncement of judgment to include the \$840 in penalty

² Section 290.3, subdivision (a), provides, “Every person who is convicted of any offense specified in subdivision (c) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, be punished by a fine of three hundred dollars (\$300) upon the first conviction . . . unless the court determines that the defendant does not have the ability to pay the fine. . . .”

assessments. (See *People v. Smith* (2001) 24 Cal.4th 849, 854 [an unauthorized sentence may be corrected at any time whether or not there was an objection in the trial court]; *People v. Scott* (1994) 9 Cal.4th 331, 354 [“a sentence is generally ‘unauthorized’ where it could not lawfully be imposed under any circumstance in the particular case”]; in such circumstances “[a]ppellate courts are willing to intervene in the first instance because such error is ‘clear and correctable’ independent of any factual issues presented by the record at sentencing”]; *People v. Hong* (1998) 64 Cal.App.4th 1071, 1075 [failure to impose a mandatory fine is jurisdictional error, which can be raised for first time on appeal and corrected by modifying the judgment].) The minute order and abstract of judgment, which included the penalty assessments, require no correction.

2. The Trial Court Did Not Miscalculate Silver’s Actual Custody Credits

The trial court awarded Silver 507 days of presentence credit (441 actual days and 66 days of conduct credit).³ Silver contends he was arrested on November 7, 2010, as reflected on one page of the probation officer’s report, not on November 17, 2010, as the court believed, and thus served 451, not 441, days in actual custody.

In support of his contention Silver points to a box on the second page of the probation officer’s report with a typed “Arrest Date” of November 7, 2010. However, the probation officer’s narrative of the offenses and the preliminary hearing transcript establish the victim reported the lewd acts on November 11, 2010 to the police, who then arrested Silver and took him into custody on November 17, 2010. The typed date in the probation officer’s report appears simply to be a clerical error. Silver was properly awarded 441 days of actual custody credit.

³ The trial court relied on defense counsel’s representation to calculate Silver’s 441 days of actual custody credit, based on an arrest date of November 17, 2010 and sentencing date of January 31, 2012.

DISPOSITION

The oral pronouncement of judgment is modified to reflect imposition of \$840 in mandatory penalty assessments based on the section 290.3, subdivision (a) sex offender fine. As modified, the judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.